Supreme Court, U.S.
FILED
JUN 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1823

==========

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

RICHARD GLADDEN,

Petitioner

VS.

RANDY W. ROACH, ET AL.

Respondents

PETITIONER'S REPLY MEMORANDUM TO BRIEF OF STATE AND MUNICIPAL RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Don Gladden
Texas Bar No. 7991000
LAW OFFICES OF DON GLADDEN
P. O. Box 50686
Fort Worth, Texas 76105
817-531-3667

June 7, 1989 ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

1. Does a law enforcement officer's use of physical violence and other deliberate means to compel a person to verbally disclose true name and address during the post-arrest booking process, violate the Fifth Amendment privilege against self-incrimination notwithstanding an absence of subjective intent on the officer's part to secure incriminating information?

2. Does charging a person with a criminal offense under Texas Penal Code Section 38.02 for asserting the Fifth Amendment privilege against self-incrimination after lawful arrest, and requiring a person so charged to post cash bond to ensure appearance at criminal trial on that alleged offense, unconstitutionally impose a cost on assertion of that privilege?

3. Under the case or controversy requirement of Article III, is a Plaintiff who seeks to enjoin municipally authorized enforcement of a State law which has violated his Fifth Amendment privilege against self-incrimination, required to prove standing by demonstrating he is "more likely than others" to again suffer the violation complained of by Petitioner?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATUTES AND RULES INVOLVED	2
PETITIONER'S REPLY TO RESPONDENTS' REASONS FOR DENYING THE WRIT	3
CONCLUSION	10

TABLE OF AUTHORITIES

Cases Page

Gladden v. Roach, 864 F.2d 1196 (5th Cir. 1989) 4

Graham v. Connor, 57 U.S.L.W. 4513 (U.S. May 16, 1989) 5

Michigan v. Tucker, 417 U.S. 433 (1974) 6

Minnesota v. Murphy, 465 U.S. 420 (1984) 5

Schall v. Martin, 467 U.S. 253 (1984) 9,10

Statutes, Codes and Constitutional Provisions:

Texas Penal Code Section 38.02 (Vernon 1974) i,2

Texas Penal Code Section 38.02 (Vernon 1989) 3,7,8,9

Article III, United States Constitution ii

Fifth Amendment to the United States Constitution ..... throughout

Section 1983, Title 42, United States Code 2

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NO. 88-1823

RICHARD GLADDEN,

Petitioner

VS.

RANDY W. ROACH, ET AL.

Respondents

PETITIONER'S REPLY MEMORANDUM TO BRIEF OF STATE AND MUNICIPAL RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATUTES AND RULES INVOLVED

Section 1983, Title 42, United States Code provides as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

Texas Penal Code Annotated Section 38.02 (Vernon 1974), at the time enforced against the Petitioner by Respondents provided:

> "Sec. 38.02. Failure to Identify as Witness.
>
> "(a) A person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information.

"(b) An offense under this section is a Class C misdemeanor."

The pertinent portion of the present Texas Penal Code Annotated Section 38.02 (Vernon February, 1989), as amended in 1987 and which Petitioner seeks to have Respondents enjoined from enforcing in the future, provides:

"Section 38.02. Failure to Identify.

"(a) A person commits an offense if he intentionally refuses to report or give his name, residence address or date of birth to a peace officer who has lawfully arrested the person and requested the information."

PETITIONER'S REPLY TO RESPONDENTS' REASONS FOR DENYING THE WRIT

Although the State Respondents assert that Respondent Roach's assault upon Petitioner occurred as a result of Petitioner's attempt to call for help,[1] this argument overlooks Respondent

[1]State Respondents' Brief in Opposition, 9.

Roach's testimony contending the assault was carried out against the handcuffed Petitioner, according to Roach, for the purpose of conducting a "pat down" search. (Pet. for Writ, 6 n.2).[2] At most, the jury found Roach's use of force not "malicious," not more than "unwise excess of zeal," nor "shocking to the conscious." (Pet. for Writ, 8) The Court of Appeals on the other hand found no unconstitutional "compulsion" because it found Roach's actions, apparently under any characterization of the facts, as "not intended to elicit damaging statements." (App. to Pet. 6, Gladden v. Roach, 864 F.2d 1196, 1198 (5th Cir. 1989). It is this excursion by the Courts below into the subjective state of

---

[2]Petitioner, of course, continues to allege that the purpose of the assault was to compel Petitioner to verbally disclose his name, address, and other booking information.

mind of the police officer which Petitioner attacks as incompatible with Fifth Amendment analysis, and upon which Petitioner raises the first of his Questions Presented. For when physically abusive governmental conduct is alleged to have violated the Fifth Amendment, neither the "generic" substantive due process standard rejected in Graham v. Conner, 57 U.S.L.W. 4513, 4515-4516 (U.S. May 16, 1989), nor the "intent to elicit damaging statements" standard adopted by the Court of Appeals adequately responds to the specific constitutional mandate that no person shall "be compelled in any criminal case to be a witness against himself." As Justice White explained in Minnesota v. Murphy, 465 U.S. 420 (1984):

> "If he asserts the privilege, he may not be required to answer a question if there is some rational basis for believing that it will incriminate him, at least without at

> that time being assured that neither it nor its fruits may be used against him in a subsequent criminal proceeding." Id. at 429 (emphasis by the Court)[3]

On an occasion which seems a long time ago to Petitioner, this Court proudly noted that "virtually every schoolboy is familiar with the concept, if not the language, of the provision that reads: 'No person...shall be compelled in any criminal case to be a witness against himself....'" Michigan v. Tucker, 417 U.S. 433, 439 (1974). Petitioner was one of those schoolboys, and he suspects the school children of today likely as knowledgeable of the principles underlying this right as he was, and is. If for no other reason, this Court should

---

[3]There is no support in the Record for the Municipal Respondents suggestion that Petitioner "admitted that in the present case, providing his name and address would in fact not incriminate him." Municipal Respondents' Brief in Opposition, 18 n.1.

not permit the Respondents and others like them to so nullify this constitutional right as to render physical abuse and criminal penalty the only reward for those persons, innocent and guilty alike, who choose to exercise it.

As for the issue of prospective equitable relief, the Petitioner has not, as the State Respondents contend, "allege[d] that [Respondent City of Denton] police officers will charge all persons arrested with a violation of Texas Penal Code Section 38.02."[4] In support of his argument that he possesses standing to enjoin this constitutionally repugnant statute, previously applied to him after his lawful arrest, the Petitioner has asserted merely that the

---

[4]State Respondents' Brief in Opposition, 11.

Respondent City of Denton "authorized" its police officers to apply Section 38.02 as that statute was applied to him, and that the Respondent City continues to authorize enforcement of that statute in the same manner. Aside from the Municipal Respondents' somewhat confusing discussion of "reasonable suspicion" related "stops", which is irrelevant given the Petitioner's concession that his arrest was lawful,[5] the Respondents have neither raised a contention nor presented proof to rebut Petitioner's case that the City in fact did, and does, authorize its police officers to enforce Section 38.02 in the manner challenged by Petitioner. No interrogatory was presented concerning municipal policy regarding the enforcement of Section

---

[5]Municipal Respondents' Brief in Opposition, 25.

38.02, as challenged under Petitioner's Fifth Amendment theory, because the District Court granted Respondents' motions for directed verdict. (Pet. for Writ, 7-8)

Finally, Petitioner does not perceive the Texas Legislature's amendment of Section 38.02 dispositive of his challenge to that statute, as do the Municipal Respondents.[6] While the existing statute makes it a criminal offense to exercise the right to silence only after lawful arrest, rather than after "lawful stop"; Petitioner at the outset of this lawsuit conceded the lawfulness of his "arrest", and "[o]bviously this Court must review the judgment below in light of the...statute as it now stands, not as it once did."

---

[6]Municipal Respondents' Brief in Opposition, 25.

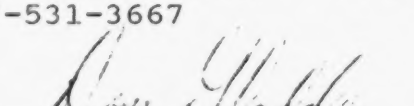
Schall v. Martin, 467 U.S. 253, 256 n.2 (1984).

CONCLUSION

For the foregoing reasons, Petitioner prays that a Writ of Certiorari issue to review the February 8, 1989 Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

LAW OFFICES OF DON GLADDEN
P. O. Box 50686
Fort Worth, Texas 76105
817-531-3667

By: 
DON GLADDEN

ATTORNEY FOR PETITIONER